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Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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Federal Rules Decisions

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AMENDING THE OTHER PARTY JOINDER AMENDMENTS^a

Carl Tobias^{aa}

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***519** Comparatively little controversy attended the semi-annual meeting of the Civil Rules Advisory Committee which was held in late November, 1991. During that meeting, however, the Committee preliminarily considered the prospect of amending Federal Rule of Civil Procedure 23, which governs class actions. The Advisory Committee broached the possibility of merging the three alternative grounds for class certification under existing Rule 23(b) into a list of factors that judges would consider. Nonetheless, it is unclear whether the Committee will ultimately propose that modification, while the Committee examined few additional specifics. The Supreme Court and Congress have not amended Rule 23 or the two other party joinder provisions, Rule 19 covering compulsory party joinder and Rule 24(a)(2) pertaining to non-statutory intervention of right since 1966, when the Court and Congress substantially revised and integrated all three provisions.

Because it now appears that the Committee intends to propose changes in Rule 23, the Committee should also reconsider the other two party joinder provisions that were simultaneously amended, especially in light of the three Rules' interrelationships and similar phrasing. For example, all of the party joinder provisions are meant to secure judicial economy through the efficient packaging of litigation, and intervention is one important procedural possibility that judges should consider when ascertaining whether joinder is feasible under Rule 19 and when courts find that absentees will not be adequately represented under Rule 23 or Rule 24(a)(2). Correspondingly, each of the Rules expressly requires that judges consider the interests of absentees whose ability to protect those interests could be impaired if the interests are not adequately represented. This essay suggests that the Advisory Committee reexamine all three party joinder provisions at the same time and offers recommendations for revising Rules 19 and 24(a)(2).

***520** Much ink has been spilled over the party joinder amendments of 1966.¹ The revisions were characterized as a comprehensive package that significantly modified party joinder.² Professor Arthur Miller has suggested that there was substantial agreement on the language of the three Rules as early as 1962,³ although the Court and the Congress did not formally adopt the amendments until 1966. This fact is important, because Congress had in 1962 passed few of the approximately forty substantive statutes, such as civil rights and environmental legislation, later dubbed "social legislation."⁴ It is fair, therefore, to assume that the Advisory Committee did not draft the party joinder amendments primarily to treat the public law litigation that these statutes facilitated.⁵ The limited provision for public law litigation became important, because Rule 24(a)(2) was to figure prominently in considerable public law litigation and Rule 19 was to be significant in some of these suits.

A few judges and several commentators subsequently identified certain difficulties that courts have experienced in applying Rule 19 and Rule 24(a)(2) to public law cases.⁶ A small number of judges and writers found that courts encountered some similar problems when enforcing the Rules in private law litigation.⁷ Two commentators, writing soon after the adoption of the party joinder provisions, suggested that Rule 24(a)(2) had been flawed in the amending process.⁸

*521 Professor Richard Freer has comprehensively analyzed the application of Rule 19 in private litigation and found the provision deficient.⁹ He claimed that Rule 19 is meant to promote efficient “packaging” of all aspects of a dispute into one lawsuit by identifying absentees whose joinder is needed for a just adjudication and by securing joinder of the non-parties but that the provision achieves neither objective completely.¹⁰ Professor Freer examined five generic situations in which joinder was necessary to prevent injury to the non-party, the defendant or the public and showed that the Rule has an insignificant role in four of the circumstances.¹¹ In the fifth case, however, he found Rule 19 to be the only technique available but that the provision undermined its objectives by requiring an independent basis of jurisdiction.¹² Professor Freer suggested that doctrinal treatment of compulsory party joinder be changed through revision of Rule 19 and statutory reform similar to the Federal Interpleader Act.¹³ The principal purpose of the recommendations would be to permit joinder when the presence of the non-party would eliminate complete diversity.¹⁴

I have evaluated judicial enforcement of Rule 19 in public law litigation and discovered that numerous courts have recognized a “public rights exception” to resolve difficult problems of compulsory party joinder.¹⁵ Judges apparently invoked this exception to facilitate plaintiffs’ vindication of important public rights.¹⁶ I found creation of the exception problematic, partly on grounds of judicial authority, and unnecessary because existing Rule 19 affords courts sufficient flexibility to reach similar results without straining the language of Rule 19 or judicial credibility.¹⁷ I offered, therefore, suggestions for flexible, practical *522 judicial application of the current Rule and did not recommend amendment.¹⁸ Change in the provision to accommodate public law cases remains unwarranted today. Nonetheless, if the Advisory Committee deems Rule 19’s revision advisable to treat public law litigation, it should seriously consider prescribing an exception for public law cases.¹⁹

The sharp dichotomization between public and private law litigation employed in analyzing Rule 19 is less necessary in the case of Rule 24(a)(2). Numerous similar problems created by judicial application of Rule 24(a)(2) arise in both public and private law litigation. Those generic difficulties, therefore, will be assessed first and the complications peculiar to public law cases will then be evaluated.

Soon after the Court and Congress adopted all three party joinder amendments, two civil procedure scholars asserted that Rule 24(a)(2) was flawed when revised.²⁰ Professor John Kennedy found that the drafters had not executed their intent to afford criteria for decisionmaking, rather than definitional classifications, thereby leaving the amendment unfinished.²¹ Professor David Shapiro effectively agreed with Professor Kennedy while recommending that a number of applicable criteria be adopted and that intervention of right be merged with permissive intervention, which Rule 24(b) prescribes.²²

Around 1980, Professor Emma Coleman Jordan and Professor Gene Shreve, writing separately, criticized courts for inconsistent enforcement of Rule 24(a)(2) and for wasting judicial resources in resolving intervention disputes, principally with appeals.²³ Both writers afforded suggestions analogous to those of Professors Kennedy and Shapiro.²⁴ Professor Jordan expressed concern that public interest litigants be adequately represented in suits that affect their interests and offered recommendations for more flexible application of Rule 24(a)(2) to achieve that objective.²⁵ Professor Shreve evinced greater concern about judicial economy and provided suggestions, such as trusting intervention of right *523 determinations to first-tier decisionmakers, aimed primarily at effecting judicial economy.²⁶

I recently analyzed judicial enforcement of the provision in public law litigation.²⁷ I found that some courts have applied Rule 24(a)(2)’s four criteria-interest, impairment, inadequate representation and timeliness-in ways that disadvantage and even exclude intervention applicants.²⁸ This has happened, although the Rule’s wording affords judges sufficient flexibility to

resolve intervention controversies properly. Unless more federal courts employ the type of flexible, pragmatic application of Rule 24(a)(2) advocated by Judge Henry Friendly,²⁹ amendment of the provision may be advisable.

Should the rule revisors find amendment of Rule 24(a)(2) appropriate to treat public or private law litigation, they ought to consider several possible approaches. Merger of intervention of right and permissive intervention may be warranted.³⁰ Whether or not merger is effected, Rule 24(a)(2) should be modified to conform with certain realities of modern litigation, such as the need to expedite dispute resolution and to have courts make the best possible substantive determinations.³¹ This might lead the rule revisors to include judicial economy and applicants' potential contributions to issue resolution as important criteria to be considered in intervention decisionmaking.³²

The Advisory Committee is now contemplating possible revision of Rule 23 governing class actions. If that effort proceeds, the Committee should seriously consider reexamining Rules 19 and 24(a)(2), the other two party joinder provisions that were simultaneously changed and integrated with Rule 23 more than a quarter-century ago. This would enable the Committee to propose an integrated package of amendments responsive to civil litigation in the twenty-first century.

The views expressed are those of the author and do not necessarily reflect the views of the publisher.

Footnotes

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^{aa} Professor of Law, University of Montana. I wish to thank Rich Freer and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

¹ See, e.g., Cohn, *The New Federal Rules of Civil Procedure*, 54 Geo.L.J. 1204 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I & II)*, 82 Harv.L.Rev. 356, 591 (1967); McCoid, *A Single Package for Multiparty Disputes*, 28 Stan.L.Rev. 707 (1976). See also Fed.R.Civ.P. 19, 39 F.R.D. 88 (1966); Fed.R.Civ.P. 23, 39 F.R.D. 95; Fed R.Civ.P. 24(a)(2), 39 F.R.D. 109.

² See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 153-54, 87 S.Ct. 932, 946, 17 L.Ed.2d 814 (1967) (Stewart, J., dissenting); Cohn, *supra* note 1, at 1204, 1230.

³ See Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem,"* 92 Harv.L.Rev. 664, 670 n. 31 (1979).

⁴ See R. Litan & W. Nordhaus, *Reforming Federal Regulation* 44 (1983) (40 statutes); Lilley & Miller, *The New "Social Regulation,"* 47 Pub. Interest 49 (Spring 1977) (social legislation). See generally Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L.Rev. 270, 284-85 (1989).

⁵ See Tobias, *Standing to Intervene*, 1991 Wis.L.Rev. 415, 432. *But cf.* Kaplan, *Comment on Carrington*, 137 U.Pa.L.Rev. 2125, 2126-27 (1989) (drafters recognized at the time of drafting that Rule 23 "would stick in the throats of establishment defendants"); Kaplan, *A Prefatory Note*, 10 B.C.Ind. & Com.L.Rev. 497, 497 (1968) (Rule 23 intended to promote more vigorous use of class action as device for vindicating interests of substantial numbers of persons who individually could not litigate).

⁶ See, e.g., *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir.1984); *Nuesse v. Camp.*, 385 F.2d 694 (D.C.Cir.1967); Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 Harv.C.R.-C.L.L.Rev. 31 (1979); Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L.Rev. 756 (1987).

- 7 *See, e.g., Schutten v. Shell Oil Co.*, 421 F.2d 869, 875 (5th Cir.1970); *Coca-Cola Bottling of Elizabethtown v. Coca-Cola*, 696 F.Supp. 57, 91-96 (D.Del.1988); Freer, *Rethinking Compulsory Party Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U.L.Rev. 1061 (1985); Shreve, *Questioning Intervention of Right-Toward a New Methodology of Decisionmaking*, 74 Nw.U.L.Rev. 894 (1980).
- 8 *See Kennedy, Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky.L.J. 329, 374 (1969); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 Harv.L.Rev. 721, 757-62 (1968).
- 9 *See Freer, supra* note 7.
- 10 *See id.* at 1061-63. *Cf. McCoid, supra* note 1, at 708 (“packaging”).
- 11 *See Freer, supra* note 7, at 1082-90.
- 12 Professor Freer used the example of *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816 (8th Cir.1977). *See also* Freer, *supra* note 7, at 1074, 1090, 1093-96.
- 13 *See* 28 U.S.C. §§ 1335, 1397, 2361 (1982) (Federal Interpleader Act). *See also* Freer, *supra* note 7, at 1097-1110 (general explanation of proposal).
- 14 *See* Freer, *supra* note 7, at 1097. Professor Freer specifically acknowledged that he had “painted with a broad brush, and some details remain for later clarification.” *Id.* at 1111 n.249. It is not clear that the recently passed supplemental jurisdiction statute, *see* 28 U.S.C. § 1367 (1990), expands jurisdiction over parties joined under Rule 19. In any event, the statute does not affect the change that Professor Freer proposed. *See generally* Mengler, Burbank & Rowe, *Congress Accepts the Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 *Judicature* 213 (1991).
- 15 *See, e.g., Conner v. Burford*, 848 F.2d 1441, 1459-61 (9th Cir.1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989); *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir.1982). *See also* Tobias, *supra* note 6, at 759-69.
- 16 *See, e.g., Sierra Club v. Watt*, 608 F.Supp. 305, 324-25 (E.D.Cal.1985); *NRDC v. Berklund*, 458 F.Supp. 925, 933 (D.D.C.1978), *aff'd*, 609 F.2d 553 (D.C.Cir.1979) (*per curiam*). *See also* Tobias, *supra* note 6, at 764-65.
- 17 *See* Tobias, *supra* note 6, at 763-69. In *Martin v. Wilks*, 490 U.S. 755, 767, 109 S.Ct. 2180, 2187, 104 L.Ed.2d 835 (1989), the Supreme Court rejected a similar, flexible, pragmatic reading of Rules 19 and 24 that civil rights plaintiffs urged. The Court also found compulsory party joinder under Rule 19 preferable to requiring intervention under Rule 24 when public law litigation is resolved through consent decrees. Congress recently modified *Martin v. Wilks* in the Civil Rights Act of 1991. *See* Pub.L. No. 102-166, 105 Stat. 1071, § 108 (1991). *See generally* Grover, *The Silenced Majority: Martin v. Wilks and the Legislative Response (forthcoming 1991 U.Ill.L.Rev.)*; Tobias, *Civil Rights Procedural Problems (unpublished manuscript) (copy on file with author)*.
- 18 *See* Tobias, *supra* note 6, at 769-92.
- 19 Of course, were judges to apply flexibly and pragmatically present Rule 19 as I have suggested, courts could felicitously achieve the same result. *See supra* note 18 and accompanying text. Professor Freer's proposal would have minimal applicability to public law litigation, nearly all of which is premised on federal question, not diversity jurisdiction. *See supra* notes 13-14 and accompanying text. *See also* Tobias, *supra* note 5, at 446 n. 195.
- 20 *See supra* note 8 and accompanying text.
- 21 *See Kennedy, supra* note 8, at 374.
- 22 *See* Shapiro, *supra* note 8, at 757-62. The criteria that he recommended included judicial economy and applicants' potential contributions to issue resolution. *Id.* at 761-62.
- 23 *See* Jones, *supra* note 6, at 47, 55-62, 69-70; Shreve, *supra* note 7, at 921-24.
- 24 *See* Jones, *supra* note 6, at 62-78, 83-86; Shreve, *supra* note 7, at 924-27.

- 25 *See* Jones, *supra* note 6, at 62-78, 83-86.
- 26 *See* Shreve, *supra* note 7, at 924-27. *See also* Brunet, *Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 Ga.L.Rev. 701 (1978). *See generally* Resnik, *Tiers*, 57 S.Cal.L.Rev. 840 (1984).
- 27 *See* Tobias, *supra* note 4, at 322-29; Tobias, *supra* note 5.
- 28 *See* Tobias, *supra* note 4, at 322-29 (four criteria); Tobias, *supra* note 5 (imposition of standing requirement which principally implicates interest criterion).
- 29 *See* *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir.1984).
- 30 *See* Shapiro, *supra* note 8, at 762. *See also* Shreve, *supra* note 7, at 926-27.
- 31 *See* Tobias, *supra* note 5, at 446-50. *See also* Bandes, *The Idea of a Case*, 42 Stan.L.Rev. 227, 227-35, 250-55, 311-14 (1990).
- 32 *See* Tobias, *supra* note 5, at 446-50, 460-63.